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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 141

VIRGINIA VANDENBARK,

Petitioner,

vs.

THE OWENS-ILLINOIS GLASS COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PAUL D. SMITH,
THOMAS H. SUTHERLAND,
Counsel for Petitioner.

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INDEX.

Subject Index.

Appendix.

TABLE OF CASES CITED,

OTHER AUTHORITIES CITED.

Blank Page

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is an action at law in the United States District Court for the Northern District of Ohio at Toledo, Ohio, against the respondent for damages alleging that she, the petitioner and appellant, was permanently and totally dis-

abled by silicosis and associated disabilities caused by the breathing of small glass particles in their factory at Newark, Ohio, for which no State Fund Compensation was available in Ohio at the time this disability occurred and this action was filed. Silicosis is compensable under Ohio law since July 31, 1937. By the demurrer (R. 6), to the first amended petition (R., 2), which was sustained, by the United States District Court and the United States Circuit Court of Appeals, it is admitted that your petitioner was disabled by the employer's violations of statutory duties, Ohio General Code Sections 871-15, 871-16, 6330-1 and 1027 (Appendix pp. 35-37), and the common law duty of the employer to warn and instruct employee of dangerous conditions existent in her employment.

Since the decision of the United States District Court for the Northern District of Ohio sustaining the demurrer in this case the Supreme Court of Ohio in the case of *Triff, Admrx.*, v. *National Bronze and Aluminum Foundry Company* and *Smith* v. *Lau*, 135 O. S. 191, 20 N. E. (2nd) 232, 121 A. L. R. 1131, has decided clearly that there is a right of action in the case at bar, and the case holds that there always had been a right to such an action within the State of Ohio.

One main question at issue is whether or not the Federal courts shall follow the pronouncement of the highest tribunal of the State and permit an action where the tortious injury was inflicted upon plaintiff and appellant, by the admitted negligence of defendant-appellee.

The demurrer was sustained by the United States District Court, Northern District of Ohio, Toledo, Ohio, and final order was made, which order was sustained by the United States Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio, and judgment of said United States Circuit Court of Appeals was entered March 13, 1940.

Further your petitioner believes that denial of State Fund Compensation, and also the denial of the right to sue at law for damages, even though the Supreme Court of Ohio, the highest tribunal of said State, has held that there is a clear right to bring such an action (*Triff, Admrx.*, v. *National Bronze and Aluminum Foundry Company*), and the denial of all procedural remedy whatsoever for her injury and disability admittedly negligently inflicted, is a denial to her of rights, benefits and privileges, guaranteed under the 14th Amendment to the United States Constitution, and is beyond the permissible legislative objects of the State of Ohio, as applied in this case, and is not equal protection of the law, and is such a gross interpretation of the Ohio Statutes to come within the prohibitions of the 14th Amendment.

II.

Reasons Relied On for Allowance of the Writ.

The United States Circuit Court of Appeals has held that the Supreme Court of Ohio changed the law of Ohio in the *Triff, Admrx.*, v. *National Bronze and Aluminum Foundry Company*, 135 O. S. 191, 20 N. E. (2nd) 232, 121 A. L. R. 1131, and that the decision of the United States District Court was correct at the time it was decided since the *Triff* case was decided thereafter. However, the *Triff* case decided by the Ohio Supreme Court pointed out that the law, as decided in that case, always had been the law in the State of Ohio and that such an action as the one at bar could always have been brought within the State of Ohio.

The dissenting opinion of Judge Allen of the Circuit Court, and the recent cases of *Carpenter* v. *Wabash Ry.*, 60 S. Ct. 416, and *Erie Ry.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 114 A. L. R. 1493, are important authorities relied on by plaintiff and appellant.

The United States Circuit Court of Appeals has also held that there was no Federal constitutional question involved, and petitioner believes that that decision is not in accord with applicable decisions of this Court. One of the Federal constitutional questions was outlined by this Court many years ago in the case of *New York Central Railroad* v. *White*, 243 U. S. 188, at page 201 (brief, pages 28-29).

The question under consideration is not whether these laws are valid under the Constitution of Ohio. But the question presented—is there a remedy for every wrong—being a Federal question, and involving a construction of the 14th Amendment to the Constitution of the United States, the Federal courts are charged with the duty and responsibility of deciding it, unaffected by the decisions of the State courts, except so far as they may be persuasive—*Myers* v. *Shields*, 61 Fed. 713.

To deny petitioner any and all civil remedy by State fund compensation or by an action at law, and all other procedural rights, violates petitioner's rights guaranteed under the 14th Amendment, and is beyond the authority of the Federal courts, and is beyond the limits of a permissible legislative object, and is sustained, petitioner believes by the following cases and others cited and discussed in the brief, to-wit:

Silver v. *Silver*, 280 U. S. 117;
Tipton v. *A. P. and S. F. Rwy. Co.*, 298 U. S. 141-155;
Geraghty v. *Lehigh Valley Rwy. Company*, 83 F. (2d) 738;
Michalek v. *U. S. Gypsum Company*, 298 U. S. 639, citing *Schmidt* v. *M. D. T. Company*, 270 N. Y. 287, 200 N. E. 824.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals, Sixth Circuit,

Cincinnati, Ohio, demanding said court to certify and extend to this Court a full and complete transcript of the record and of all the proceedings of said United States Circuit Court of Appeals, Sixth Circuit, had in the case No. 8151, Virginia Vandenbark *vs.* The Owens-Illinois Glass Company, now plaintiff and appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes and Constitution of the United States, and that the judgment of the said Circuit Court of Appeals may be reversed by the United States Supreme Court and for such further relief as this Court may deem just and proper.

VIRGINIA VANDENBARK,
By PAUL D. SMITH AND
THOMAS H. SUTHERLAND,
Marion, Ohio,
Counsel for Petitioner.

Dated June 8, 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 141

VIRGINIA VANDENBARK,

Petitioner,

vs.

THE OWENS-ILLINOIS GLASS COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

I. Opinions of the Court Below.

An opinion was written by the United States Circuit Court of Appeals, Sixth Circuit, which opinion is found and is reported in 110 F. (2d) 310, dissent by Judge Allen 314. A copy of the journal entry of the United States Circuit Court of Appeals is found in the record, page 13. The United States District Court entered no opinion. The journal entry of the United States District Court finally dismissing said cause is found in the record submitted herewith at page 6.

II. Jurisdiction.

1. The judgment of the United States Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio, to be reviewed was entered on March 13, 1940.

2. The statutory provision believed to sustain the jurisdiction of this Court is Title 28, U. S. C. 347, which amended judicial Section 240.

3. The decision of the majority of the United States Circuit Court is here questioned, and it is urged that the case of *Triff* v. *National Bronze and Aluminum Foundry Company,* 135 O. S. 191 20 N. E. (2nd) 232, 121 A. L. R. 1131 and *Carpenter* v. *Wabash Ry.,* 60 S. Ct. 416, *Erie Ry.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, and the dissenting opinion of Judge Allen should govern this cause. Other cases are cited in the brief.

4. The Statute of the State of Ohio and a part of the Ohio Constitution the validity of which are questioned, so far as they apply to this case, in denying all remedy here, which the case of *Triff* v. *National Bronze and Aluminum Foundry Company, supra,* clearly grants under Ohio Law are,

(A) G. C. 1465-70 (Appendix page 37);
(B) Article 2 Section 35 Ohio Constitution (Appendix page 37).

Under the majority opinion of the United States Circuit Court the above sections would be applicable to the case at bar. If these sections are applicable they are claimed to clearly deny the rights of plaintiff-appellant guaranteed under the 14th Amendment.

5. The errors here assigned were raised in the lower court by assignment of errors duly filed, with supporting

brief. The error here charged against the United States Circuit Court of Appeals by failing to follow the law of the highest tribunal of the State of Ohio in this case as laid down in the case of *Triff, Admrx.* v. *National Bronze and Aluminum Foundry Company,* and *Smith* v. *Lau,* 135 O. S. 191, 20 N. E. (2d) 232, 121 A. L. R. 1131, was argued and discussed by the United States Circuit Court. The assignment of errors in the United States Circuit Court of Appeals, Sixth Circuit, are found in the record, pages 9-11.

III. Statement of the Case.

This has already been stated in the preceding petition under number I, which is hereby adopted and made a part of this brief.

IV. Specification of Errors.

(1) The Court erred in sustaining the order of the United States District Court, thereby sustaining the demurrer of defendant to the amended petition of plaintiff-appellant below.

(2) That the Court erred in failing to apply the proper law, as applicable to such cases as the one at bar, and in particular failing to apply the law of *Triff* v. *National Bronze and Aluminum Foundry Company,* 135 O. S. 191, 20 N. E. (2d) 232, 121 A. L. R. 1131.

(3) By sustaining the order of the District Court, and thereby holding that the plaintiff's amended petition does not state facts which show a cause of action.

(4) By failing to hold that Section I of the 14th Amendment to the United States Constitution grants and guarantees this petitioner a cause of action for tortious injuries arising out of admitted negligence.

(5) In holding that Section 1465-70 of the General Code of Ohio was not violative of Section I of the 14th Amend-

ment to the United States Constitution, insofar as it denied to this petitioner, ineligible for State fund compensation, the right to a civil action at law for negligence.

(6) In holding that Section 35 Article II of the Ohio Constitution was not violative of Section I of the 14th Amendment to the Constitution of the United States insofar as it denied to this petitioner, ineligible for State fund compensation, the right to a civil action at law for negligence.

(7) In holding that Section 35 Article II Ohio Constitution denies to this petitioner all remedies of any kind and that such construction of said Constitution is so arbitrary, unreasonable and unjust as to contravene the guarantee of Section I of the 14th Amendment to the United States Constitution.

(8) In holding that Section 1465-70 General Code constitutes a bar to this action and that said construction is so arbitrary, unreasonable and unjust as to contravene the guarantee of Section I of the 14th Amendment to the United States Constitution.

(9) By failing to hold that the Federal District Court must follow the common law as laid down by the highest tribunal of its State, and also the recent law of this United States Supreme Court.

(10) By entering the final order dismissing this cause March 13, 1940, and affirming the judgment of the Court below.

(11) By other errors apparent on the face of the record.

The assignments of errors herein above stated it is believed condense into the following two questions:

I. That the lower courts failed to properly apply the law of Ohio and of the Federal courts and to correctly follow the law under all of the facts and circumstances herein.

II. Plaintiff and appellant or petitioner has rights which have been clearly violated under the 14th Amendment to the United States Constitution.

I.

This case is one where new decisions of the State and Federal courts are involved and which petitioner urges should be applied, rather than the old cases, which old law and cases if here applied may deny this plaintiff and appellant any and all remedy for injury or disability tortiously inflicted.

The new law or decisions is found particularly in the cases of:

Triff v. *National Bronze and Aluminum Foundry Company*, 135 O. S. 191, 20 N. E. (2d) 232, 121 A. L. R. 1131;

Carpenter v. *Wabash Rwy. Co.*, 60 S. Ct., 416, 84 L. Ed. decided January 29, 1940;

Erie Rwy. v. *Tompkins*, 304 U. S. 64; 58 S. Ct. 817, 82 L. Ed. 1188.

To apply the above cases, the late cases, to this case and grant plaintiff and appellant a remedy does not stretch the imagination but as Judge Allen in her dissent in the United States Circuit Court says:

> "* * * the court has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may require; *and in determining what justice now requires, the court must consider the changes in fact and in law which have supervened since the decree below was entered.*"

When this case was originally filed in the United States District Court certain cases in Ohio had held that there was no right to sue for an occupational disease, negligently inflicted, the Ohio courts never making any holding with re-

gard to a case where there was negligence on the part of the defendant—simply and completely ignoring this all important phase. *Zajachuck* v. *Willard Storage Battery Company*, 106 O. S. 538, 140 N. E. 405, and *Mabley & Carew* v. *Lee*, 129 O. S. 69, 193 N. E. 745.

Neither was there any recovery of any kind from the Workmen's Compensation Fund of the State of Ohio. This direct action at law was all this plaintiff-appellant had at her disposal, an action for permanent and total disability caused by the actionable negligence of her defendant employer, both statutory and common law.

The United States District Court apparently followed these cases, it also ignoring the salient question of negligence.

The District Court turned down the plaintiff's claim that to deny plaintiff-appellant all remedy denied her rights under the 14th Amendment, which questions are hereafter discussed.

Then, after the District Court had dismissed the case at bar, and appeal had been perfected into the United States Circuit Court the Ohio Supreme Court in the consolidated cases of *Triff* v. *National Bronze and Aluminum Foundry Company* and *Smith* v. *Lau*, 135 O. S. 191, 20 N. E. (2d) 232, 121 A. L. R. 1131 *held that there is a right to sue by an employee for an occupational disease or diseases caused by negligence of the employer and such right always had existed in Ohio.*

This decision was and is in accord with the almost universal holdings of all the State courts and of the Federal courts when there was a Federal Common Law applied.

Therefore, the First Question is Whether the Case of Triff vs. National Bronze and Aluminum Company Above Shall be Applied to This Case While Pending Hearing in the United States Circuit Court, and This Plaintiff-Appellant Granted Some Remedy.

Following the strong and logical dissenting opinion of Judge Florence Allen of the United States Circuit Court of Appeals in this case the Appellant here urges that the case of *Carpenter* v. *Wabash Rwy. Company,* 60 Sup. Ct. 416, by no means directs that the District Court must be affirmed, but rather directs in clear language that here the District Court and now the United States Circuit Court must be reversed.

The United States Circuit Court of Appeals majority opinion held that the District Court was correct when its order of dismissal was made. This analysis is subject to *serious doubt* for the Supreme Court of Ohio in the *Triff* case above cited at 135 O. S. at 206 held that that analysis is incorrect and that there always was a right to sue saying to-wit (italic ours):

> *"At the time workmen's compensation was first adopted in Ohio an action for occupational disease or for wrongful death therefrom could be maintained against the employer GUILTY OF ACTIONABLE NEGLIGENCE. There has never been a statutory or constitutional provision expressly denying the right to maintain an action growing out of a non-compensable occupational disease."*

The occupational diseases alleged in the plaintiff's petition in the District Court were each and all non-compensable under the Industrial Compensation Act of Ohio.

If the United States District Court was right—and we urge it was not—the Supreme Court of Ohio has as much right and authority to change rules of law applicable as does the Congress of the United States as was done in the *Carpenter* v. *Wabash Rwy.,* 60 Sup. Ct. 416, where the statute applied being contrary to the statutes and decisions of the courts of Missouri where the case arose, the United States Supreme Court decided that a new—and changed

law applied and gave a right to the claimant where the New Federal Statute read to-wit:

> "Petition for certiorari was filed on July 26, 1939. Subsequently, by Act of Congress approved August 11, 1939, subsection of Section 77 of the Bankruptcy Act was amended, 11 U. S. C. A. #205, sub. n, so as to apply to equity receiverships and thus to read as follows: In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, *arising under State or Federal laws,* and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad."

Also in the *Carpenter* case at page 418, the United States Supreme Court said:

> "For the present purpose, we may assume, without deciding that the determination of the court below was correct upon the record before it and in the light of the law as it then stood. But it is our duty to consider the amended statute and to decide the question in harmony with its provision, if found to be applicable. The controlling rule was thus stated by Chief Justice Marshall in United States *v.* Schooner Peggy, 1 Cranch 103, 110, 2 L. Ed. 49: "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. *But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.* • • •

In such a case the court must decide according to existing laws, *and if it be necessary to set aside a judgment; rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.*"

"See, also Dinsmore *v.* Southern Express Co., 183 U. S. 115, 120, 22 S. Ct. 45, 46, 46 L. Ed. 111; Crozier *v.* Fried. Kruff Aktiengesellschaft, 224 U. S. 290, 302, 32 S. Ct. 488, 490, 56 L. Ed. 771; Gulf, Colorado & Santa Fe R. Co. *v.* Dennis, 224 U. S. 503, 506, 32 S. Ct. 542, 543, 56 L. Ed. 860; Watts, Watts & Co. *v.* Unione Austriaca di Navigazione, 248 U. S. 9, 21, 39 S. Ct. 1, 2, 63 L. Ed. 100, 3 A. L. R. 323."

The affirmance of the decision of the District Court and of the United States Circuit Court can not now be done except, "in violation of law", if we follow the law of Ohio as interpreted by the highest tribunal of that State. Therefore if we follow the rule of the *Peggy* case as indicated in the *Carpenter* case above the judgment of the United States Circuit Court must be set aside."

Further the case at bar has been pending and is now pending according to the laws and rules of the Federal courts and as stated in the *Carpenter* case above to-wit, page 419:

"There is no suggestion that the present proceeding had been terminated prior to the enactment of the amendment or that it is not now pending. The statute is explicit and mandatory and the District Court has no discretion to act contrary to its terms."

It is urged that the United States District Court—and the United States Circuit Court of Appeals are bound by the explicit and mandatory words of the decision of the Supreme Court of Ohio in the case of *Triff* v. *National Bronze and Aluminum Foundry Company*, 135 O. S. 191, which words are heretofore quoted.

If the lower Federal courts are not so bound by the Ohio law then plaintiff is left absolutely remediless under the law. *First* she can not recover in this action at law, and, *second,* she can not recover under Ohio Occupational Disease Laws, old General Code 1465-68 effective July 31, 1937, or any other laws preceding, or under General Code 1465-68-a—effective May 26, 1939, passed within two months after the decision in the *Triff* v. *National Bronze and Aluminum Foundry Company* decision, above.

As Judge Allen of the United States Circuit Court in her dissent points out with regard to the *Triff* v. *National Bronze and Aluminum Foundry Company,* 135 O. S. 191, 20 N. E. (2d) 232, 121 A. L. R. 1131 (italics ours):

> "• • • the decision falls squarely within the purview of Erie Ry. Co. *v.* Tompkins, 304 U. S. 64 (58 S. Ct. 817, 82 L. Ed. 1188). That case declared that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute *or by its highest court in a decision is not a matter of federal concern.*"

That the United States Supreme Court should consider the altered and changed situation is clearly pointed out by the decisions of Judge Florence Allen of the Circuit Court, to-wit (italics ours):

> "Nor is the doctrine declared in Carpenter *v.* Wabash Ry. Co., 60 Sup. Ct. 416, 84 L. Ed., limited as appears from the majority opinion. While that case relied upon United States *v.* Schooner Peggy, 1 Cranch 103, 110, 2 L. Ed. 49, an extract from which appears in the majority opinion, it also relied upon other decisions cited, among which is Gulf, Colorado & Santa Fe Ry. Co. *v.* Dennis, 224 U. S. 503, 32 S. Ct. 542, 543, 56 L. Ed. 860. The court in that case, applying the principle of United States *v.* Schooner Peggy, supra, stated:

"We think what was there said is, in principle, applicable here. For while, on a writ of error to a state court, our province ordinarily is only to inquire whether that court has erred in the decision of some Federal question, *it does not follow that where, pending the writ, a statute of the State or a decision of its highest judicial tribunal intervenes and puts an end to the right which the judgment sustains, we should ignore the changed situation, and affirm or reverse the judgment with sole regard to the Federal question.* On the contrary, WE ARE OF OPINION THAT IN SUCH A CASE IT BECOMES OUR DUTY TO RECOGNIZE THE CHANGED SITUATION, AND EITHER TO APPLY THE INTERVENING LAW OR DECISIONS OR TO SET ASIDE THE JUDGMENT AND REMAND THE CASE SO THAT THE STATE COURT MAY DO SO."

Cf. Crozier *v.* Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 32 S. Ct. 488, 56 L. Ed. 771; Watts, Watts & Co., Ltd. *v.* Unione Austriaca, Etc., 248 U. S. 9, 21, 39 S. Ct. 1, 63 L. Ed. 100, 3 A. L. R. 323. As stated in the Watts case, 248 U. S. p. 21, 39 S. Ct. 1, 63 L. Ed. 100, 3 A. L. R. 323, the court has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may require; and in determining what justice now requires, the court must consider the changes in fact and in law which have supervened since the decree below was entered."

Again in *Erie Rwy.* v. *Tompkins* the United States Supreme Court, 114 A. L. R. p. 1493, said:

"* * * There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or A PART OF THE LAW OF TORTS. * * *"

In the same *Erie Rwy.* v. *Tompkins* case, A. L. R. p. 1491, this Court said:

"Swift *v.* Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed

> under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court: and in the privilege of selecting the Court in which the right should be determined was conferred upon the non-citizen. THUS THE DOCTRINE RENDERED IMPOSSIBLE EQUAL PROTECTION OF THE LAW. * * *"

Thus in the instant case to deny recovery—to deny the right to sue to this plaintiff-appellant will defeat the wrongs sought to be remedied by the *Tompkins* case. The plaintiff-appellant could recover had she brought her suit in an Ohio Court, but can not recover in a Federal court should the decisions of the lower courts be affirmed.

In the *Smith* v. *Lau*, and *Triff, Admrx.* v. *National Bronze and Aluminum Foundry Company*, 135 O. S. 191, the original petition was filed on January 15, 1935, in the Court of Common Pleas, Marion County, Ohio, and that plaintiff is now in the process of seeking recovery. Virginia Vandenbark, plaintiff and appellant in this case filed her petition in the United States District Court at Toledo at a later date to-wit: March 29, 1937—Record page 1 and under the lower court's decision would be denied all recovery of every kind. Thus the doctrine of equal protection of the laws of the State of Ohio would be clearly defeated, unless this United States Supreme Court allows a writ of certiorari and reversed the decision of the United States District Court of Appeals.

On March 3, 1936, in *Schmidt* v. *Merchants Despatch Transportation Company*, 270 N. Y. 287, 200 N. E. 824, the highest court of New York made certain interpretations of the State Law of New York relative to pleading, statute of limitations and what constituted a cause of action in New York, said opinion modifying the opinions of the lower State courts.

Later, April 13, 1936, the United States Supreme Court followed this new interpretation of the New York law in a case which had come up through the Federal courts in *Michalek* v. *United States Gypsum Company,* 80 L. Ed. 1372, 298 U. S. 639, reversing the lower Federal courts upon the sole authority of the then recently decided case in the State court of *Michalek* v. *United States Gypsum Company.*

The United States Supreme Court did follow the latest pronouncement of the State courts—and did reverse the lower Federal courts on that authority, and it is submitted that the majority of the United States Circuit Court in the case at bar misconstrued this situation in holding that these cases did not apply.

Judge Allen of the Circuit Court in her dissent cited the case of *Gulf, Colorado & Santa Fe Rwy. Company* v. *Dennis,* 56 L. Ed. 861, 224 U. S. 503. Further consideration of that case shows that, quote:

> "Since the case was brought here the statute under which the attorneys' fee was awarded has been adjudged invalid under the state Constitution, by the highest court of the state, because the subject to which it relates is not sufficiently expressed in its title. Ft. Worth & D. C. R. Co. *v.* Loyd, — Tex. Civ. App. —, 132 S. W. 899. Thus, the judgment of the county court and the later decision of the highest court of the state are not in accord. *The former proceeds upon the theory that the statute is valid under the state Constitution, while the latter conclusively establishes that it is invalid.* In these circumstances, what is the duty of this court respecting this matter of local law? *Must we proceed upon the same theory as did the county court, or must we give effect to the later decision of the highest court of the state?*"

The United States Supreme Court there said further:

> *"The case is still pending. The right to the attorneys' fee is still sub judice.* * * *"*

Further quoting:

> "If this were a criminal case wherein the accused had been convicted of a violation of a state statute, alleged to be repugnant to the Constitution of the United States, would we not give effect to an intervening decision of the highest court of the state, declaring the statute invalid under the state Constitution?"

Further:

> "On the contrary, we are of opinion that in such a case it becomes our duty to recognize the changed situation, and either to apply the intervening law or decision, or to set aside the judgment and remand the case so that the state court may do so. *To do this is not to review, in any proper sense of the term, the decision of that court upon a non-Federal question, but only to give effect to a matter arising since its judgment, and bearing directly upon the right disposition of the case.*"

Further:

> "The reasons are quite as strong, to say the least, for applying the rule to a writ of error to a state court, on which the jurisdiction of this court is limited to Federal questions only, as to a writ of error to a circuit court of the United States, on which the jurisdiction of this court extends to the whole case."

This decision being one on appeal from a State court, jurisdiction of the Supreme Court being solely on a Federal question involved, even there and solely because of a changed State court ruling on a non-Federal question this Court, in order to grant effectual relief—the saving to plaintiff in error of a $20.00 attorney fee which had been assessed against plaintiff in error in the lower courts—reversed the judgment so that the State court could apply the decision made after appeal to the United States Supreme Court.

Crozier v. *Fried, Krupp Aktiengesellschaft,* 56 L. Ed. 771, 224 U. S. 290, cited by Judge Allen in her dissent is a case where the defendant in the United States Supreme Court was a corporation organized under the laws of the German Empire and injunction suit was brought June 8, 1907, in the District of Columbia for infringements on certain gun patents by a United States Army Officer.

Prayer was for an injunction to enjoin use of the inventions and for an accounting of profits and judgment for same.

During 1910, after the above suit was brought a *new law* was passed by Congress.

Before 1910 when an officer of the Government had infringed a patent right for the benefit of the Government the power to sue the United States did not obtain unless it was established that a contract to pay could be implied,—the mere wrong doing did not give a right to sue.

The law of 1910 was passed evidently to correct the injustice and under that law it was prescribed that whenever an invention patented should be so used without license of the owner then the owner could recover reasonable compensation for such use.

The court said that the act *was not retroactive.*

Therefore after the Act of 1910 there was no possibility of the right to a permanent injunction in behalf of claimant and against the officer.

Under these facts of changing law, the District of Columbia Court of Appeals was reversed, and a decree dismissing the bill without prejudice to the claimant to proceed in the Court of Claims to recover for the loss—of course all under the new and changed law of 1910—the opinion of the United States Supreme Court being announced April 8, 1912.

The case of *Watts, Watts, & Co. Ltd.* v. *Unione Austriaca, etc.,* 248 U. S. 21, 39 S. Ct. 1, 63 L. Ed. 100, 3 A. L. R. 323,

cited by Judge Allen in her dissent is a case involving changed conditions due to war.

August 4, 1914 Great Britain declared war against Germany, and on August 12, 1914 against Austria Hungary. Prior to August 4th, the British Corporation had supplied certain goods to an Austro-Hungarian Corporation.

May 27, 1915 the case was dismissed by United States District Court.

December 14, 1915—affirmed by Circuit Court of Appeals.

July 21, 1916—Certiorari and return were filed in United States Supreme Court.

December 7, 1917—President of United States issued proclamation of war between the United States and Austria Hungary.

The United States Supreme Court then said:

> "This Court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case *as justice may at this time require.*"

Further:

> "AND IN DETERMINING WHAT JUSTICE NOW REQUIRES, THE COURT MUST CONSIDER THE CHANGES IN FACT AND IN LAW WHICH HAVE SUPERVENED SINCE THE DECREE WAS ENTERED BELOW."

The decree dismissing the case was set aside and the case remanded to the District Court for further proceedings, no action to be taken until peace was restored, except to protect the rights of the parties involved—and the continuance of the bond already placed.

WE NOW COME TO AN ANALYSIS OF THE MAJORITY OPINION OF THE UNITED STATES CIRCUIT COURT IN THE CASE AT BAR.

Page three of the majority opinion the court below states that it is the settled law that the Federal courts have

an independent jurisdiction in the administration of State laws coordinate with, and not subordinate to that of the State court,

> "and when rights have accrued under a particular state of the decisions they may adopt their own interpretation of the law applicable to the case, altho a different application may be adopted by the State Courts after such rights have accrued."

The case of *Burgess* v. *Seligman*, 107 U. S. 33, 2 S. Ct. 15, 27 L. Ed. 359, is cited as authority. That case was decided January 29, [illegible] and long before the *Erie Rwy. Co.* v. *Tompkins*, the language of which applying to the above reads:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of federal concern. * * *"

That a case is still pending while on appeal and that no rights have accrued simply because of the decision by the District Court is shown by practically every case cited heretofore in this brief, and specifically so in *Gulf Co. & Santa Fe Rwy. Co.* v. *Dennis*, quote:

> "The case is still pending. The right to the attorneys' fee is still *sub judice*."

From the cases heretofore cited this would seem to be particularly true in tort cases.

It is urged that the *Burgess* v. *Seligman* case being one on the question of liability, or exemption of persons holding stock as collateral security from the issuing corporation itself—and not a case of tort where as at bar *no remedy whatsoever* is otherwise *available* for violation

of State laws creating a physical disability—is within the purview of the *Erie Rwy.* v. *Tompkins* and is overruled, it applying to a case like the one at bar.

The majority opinion at bar in the Circuit Court goes further to hold that the decision of the State court rendered after decision of the District Court cannot be given a retroactive effect so as to make erroneous that which was not so when rendered.

But the Supreme Court of Ohio as previously pointed out has held that there *always has been a right to sue in a case like the one at bar,* where the defendant was negligent.

If that right has not always existed, then all of the later cases heretofore cited in this brief indicate that the equity, the change of law and of facts occurring after appeal must be applied by the Federal court of last resort.

The Circuit Court cited *Concordia Ins. Co.* v. *School District,* 282 U. S. 545, 51 S. Ct. 275, 75 L. Ed. 528, as one case for authority for the above asserted proposition. That case was decided February 24, 1931 and of course before the *Erie Rwy.* v. *Tompkins* case. A trial had been had in the lower court and the question was whether the insured should have the right to recover interest from the date when the loss actually occurred. It was claimed a later State court decision gave the right to such a recovery.

Even tho decided before the *Tompkins* case it is one where recovery of the principal amount was made, and not one of tort where any and all recovery was denied as is the case at bar.

The second case cited by the Circuit Court is that of *Board* v. *Deposit Bank,* 124 Fed. 18. The case is one on the question of the right of a State to levy a tax on a bank and not one in tort as the case at bar. It held that the upper Federal court would not accept the changed

view of the upper State courts but was decided long before the later cases heretofore cited and it is urged is contrary to the law of the later decisions.

The case of *Morgan* v. *Curtenius,* 20 How. 1, 3, cited by the majority opinion is also a case involving real estate titles, a settled rule of property at the time of the decision of the lower Federal court. The State court change of rule was held not binding upon the upper Federal court. The case was decided January 25, 1859, long before the modified rules of the later cases herein cited. It is not a tort case and need not apply in the case at bar as is held by the Circuit Court.

The case of *Pease* v. *Peck,* 18 How. 595, 598, 15 L. Ed. 518, cited by the majority of the Circuit Court decided May 14, 1856, on the facts also differs radically from the case at bar. The Supreme Court of Michigan decided differently after decision of the lower Federal court, and in the *Pease* case the United States Supreme Court said:

> "• • •, we do not feel bound to follow the last, *if it is contrary to our own conclusions.* • • •"

This Court pointed out further that to follow the changed Michigan law would,

> "• • • by retroaction, destroy vested rights of property of citizens of other states, while it protects the citizens of Michigan from the payment of admitted debts."

Again not a tort case where all right was denied—but where rights of citizens of another State were being properly protected.

The case of *Roberts* v. *Bolles,* 101 U. S. 119, 25 L. Ed. 880, cited by the majority of the United States Circuit Court is a case on the validity of bonds where the people of the township had the privilege to and did vote on the issuance

of the bonds, and a later decision of the State court held that the law making bonds valid where voted on tho improperly issued by supervisor and town clerk, an invalid law.

The United States Supreme Court specifically did not apply the State law—a decision of the State court in the words as conclusive:

> "We cannot give our assent to this proposition, for the reason, if there were no other, that the decision (meaning the state decision) does not touch the precise point upon which we sustain their validity, despite the defective application and notice for the election of March 25, 1869. No reference is made, in that case to the 5th section of the Act of March 6, 1867, upon which we have commented. * * *"

The United States Supreme Court held the State decision was *not in point*.

Again a case where had the United States Supreme Court taken the reverse view innocent purchasers of the bonds would have lost their investment in bonds actually voted on by the tax-payers of the taxing district.

Not one single case cited by the majority of the Circuit Court is a tort case, and especially one where a defendant has violated specific legislative enactments of the State and imposed a disability as a result of which plaintiff has absolutely no other recourse whatsoever. That is not the logic nor the equity applied in any single one of the cases cited by the majority opinion.

The majority opinion—United States Circuit Court,

> "The amendment to the Ohio Statute here involved is not retroactive either expressly or by the necessary import of its terms, and is not claimed to be so" (R. 18).

the court clearly missed the clear statement of the Ohio Supreme Court in *Triff* v. *National Bronze and Aluminum*

Foundry Company, 135 O. S. 191, 20 N. E. (2d) 232, 121 A. L. R. 1131 *that there always had been a right to sue.* No language could be "clearer, stronger or more imperative" than that used by the Ohio Supreme Court. The amendment to the Ohio Statutes has absolutely nothing to do with the case at bar, except that it now purports to give to claimants like this plaintiff a recovery from the Ohio Industrial Commission, that is, claimants after the applicable date of the Acts of May 26, 1939 and July 21, 1937, neither of which can possibly apply in this case. By the Ohio Supreme Court's verdict the previous right was and is a direct suit *at law* if there be negligence.

It is strenuously urged that the new decisions and facts should be applied, and this plaintiff-appellant given her legitimate day in court and the decisions of the lower courts reversed and this case ordered to trial.

A favorable decision on this first question would dispose of the necessity of a ruling on the Federal question hereinafter discussed, but otherwise said Federal questions are urged to be of paramount importance.

II.

The Federal Constitutional Questions.

1. May the plaintiff-appellant under the 14th Amendment be denied the right to any and all civil action against her employer for disability due to violation of statutes, and the common law duty to warn and instruct of dangerous conditions where said appellant is denied participation in the Workmen's Compensation Fund of her State, and has no other civil remedy whatsoever?

2. Does the equal protection clause of the 14th Amendment to the Constitution permit Ohio to deny plaintiff-appellant all rights to a civil action for disability imposed by negligence when others suffering from disability imposed

by 22 other industrial irritants did receive and could receive compensation under the Workmen's Compensation Act of Ohio, all applicable at the same time.

Argument.

As pointed out in a previous part of this brief the Supreme Court of Ohio in the case of *Triff* v. *National Bronze and Aluminum Foundry Company*, 135 O. S. 191, 20 N. E. (2d) 232, 121 A. L. R. 1131, has been decided since this action was filed in the Federal District Court and after the appeal into the United States Circuit Court in which case the Supreme Court of Ohio has held that *there is a right to sue in Ohio at common law in a case like the one at bar, and that there never was any bar whatsoever against such a suit in Ohio either by General Code 1465-70 or by the Ohio Constitution Article II Section 35.*

Therefore the courts by the decisions below, and by decisions prior to the *Triff* case have denied to this plaintiff-appellant rights which she is guaranteed to under the 14th Amendment, and if G. C. 1465-70—Appendix page 37 is applicable then a right of this plaintiff has been clearly and unmistakably taken away without the placing of anything whatsoever in the place thereof and comes within the contravention of the 14th Amendment.

The same reasoning applies to Article II Section 35 Ohio Constitution—Appendix page 37.

The United States Supreme Court has heretofore clearly outlined one of the constitutional questions involved at this point:

> "Nor is it necessary, for the purpose of the present case, to say that a state might, without violence to the constitutional guarantee of "due process of law" suddenly set aside all common law rules respecting liability as between employer and employee, without providing

a reasonable just substitute. * * * *It perhaps may be doubted whether the state could abolish all rights of action, on one hand, or all defenses on the other, without setting up something adequate in their stead.* No such question is here presented, and we intimate no opinion upon it." *New York Central* v. *White*, 243 U. S. 188 at 201.

In that same case the United States Supreme Court said further:

> "The common law bases employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law."

This plaintiff-appellant and petitioner has been refused all remedy and has been given no rights for her employer's "disregard of some duty imposed by law." Her right to the common law duty to be warned and instructed of dangerous conditions has been completely abrogated without any remedy being given in the place thereof.

It is urged that such a denial violates the law laid down by United States Supreme Court in *Silver* v. *Silver*, 280 U. S. 117 at 122.

> "The Constitution permits the destruction of common law rights, 'to attain a permissible legislative object.'"

In *Tipton* v. *Atchison P. & S. F. R. Co.*, 298 U. S. 141-155 where, a railroad switchman was injured in California due to a defective coupling apparatus upon a freight car in violation of the Federal Safety Appliance Act the Court held that the Workmen's Compensation Act of California afforded the only remedy available to petitioner, but said at page 153:

> "Thus, by its plain terms, the Compensation law *embraces injuries to an employee circumstances as was* the petitioner in this case."

At pages 148-149:

> "California is at liberty to afford any appropriate remedy for breach of the duty imposed by the Safety Appliance Act."

In the case of *Geraghty* v. *Lehigh Valley R. Co.*, 83 F. (2d) 738, an action for damages and death due to negligent acts in violation of the Federal Employers' Liability Act, where a defective coupling was the cause of the injuries, the Federal Circuit Court held that the New Jersey Compensation Law afforded the only remedy, but a remedial procedure and remedy *was* or had been *available* to the petitioner.

The contention of this petitioner has been sustained by the United States Supreme Court in the case of *Jacque* v. *Locke Insulator Corp.*, 70 F. (2d) 680—cert. denied 293 U. S. 585, where the respondent used the Ohio law to support their case, and the court rejected that reasoning, but permitted recovery in a case like the one at bar.

Cases cited by the United States Supreme Court in the case of *Mozingo* v. *The Marion Steam Shovel Company*, 298 U. S. 645, are distinguishable from the case at bar as follows:

(a) *N. Y. C.* v. *White*, 243 U. S. 188.

The New York Industrial Commission awarded compensation to White. The question presented was the justice of substitution of Workmen's Compensation Act for the existing liabilities of the master.

(b) *Mountain Timber Company* v. *Washington*, 243 U. S. 219.

A corporation refused to pay premiums to the Workmen's Compensation Fund and the State brought action to compel it to obey the law. This is not a case where the employee petitioner received no compensation and no remedy whatsoever.

(c) *Middleton* v. *Texas Power and Light Company* (249 U. S. 152).

A workman refused an available award of compensation. The point decided is that the Workmen's Compensation Act is exclusive where it provides a remedy.

(d) *Rowlette* v. *Rothstein Dental Laboratories, Inc.*, 289 U. S. 736. Affirming 53 F. (2d) 150.

A minor coming of age refused to accept compensation previously granted him thereby repudiating the action of his guardian. The abolition of his one right, suit, was accompanied by the creation of another—compensation.

That the decision of the lower Federal courts in this case is contrary to the rule being applied by the decisions of the other lower courts and abrogates the safety statutes of Ohio is clearly indicated by 71 *Corpus Juris*, Section 1494; 28 R. C. L. 830; L. R. A. 1916 A. 223; *Zajowski* v. *Am. Steel and Wire Company*, 258 Fed. 9, 6 A. L. R. 348 (an Ohio case); and *Jones* v. *Rinehard & Dennis Co.*, 113 W. Va. 414, 168 S. E. 482, and other cases cited heretofore in this brief.

The Ohio Safety Statutes involved and which have been violated are G. C. 871-15, 871-16, 6330-1 and 1027 (appendix, pages 35-37), and provide generally that the employer must provide reasonably effective devices to protect the employee; that a place of employment which is safe shall be provided, and processes and methods adopted to make the employment safe; and shall do everything necessary to protect the life, health, safety and welfare of such employees.

II.

Does the "Equal Protection Clause" of the Fourteenth Amendment to the United States Constitution permit denial to this petitioner all right to a civil action for injuries and disability imposed by negligence when others suffering from injury and disability imposed by 22 other industrial irritants receive compensation under the Workmen's Compensation Act of Ohio?

Quoting the United States Supreme Court in *Gulf and Colorado Santa Fe R. R. Co.* v. *Ellis*, 165 U. S. 150:

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of right which is the foundation of free government."

Plaintiff-appellant falls naturally into the class of the so-called occupationally diseased. Out of the class of industrial irritants are picked 21, now 22, by Ohio General Code 1465-68-a and those affected by this preferred group receive industrial compensation from the State Fund. To make the classification more arbitrary and unjust, violation of a specific safety requirement gives the occupationally diseased in this group additional compensation of 15% to 50% (Article 2, Section 35, Ohio Constitution).

To a selected class is given compensation and to this petitioner is given nothing, in fact a detriment is imposed, a burden, a tax, a penalty as this appellant is forced to bear the entire burden of disability imposed upon her by her employer's negligence, the burden of premature death, the loss of her life and liberty, all because of her employer's negligence, all of which is now contrary to the rule of the

State of Ohio as decided in *Triff* v. *National Bronze and Aluminum Foundry Company* case.

> "It is not competent for the legislature to give one class of citizens legal exemption for wrongs not granted to others; and it is not competent to authorize any person natural or artificial, to do wrong to others without answering fully for the wrong." *Park* v. *Free Press Co.*, 72 Mich. 560, at 568. Approved in 84 Ohio State 408, 423, 95 N. E. 917.

The unreasonableness of the Ohio classification applicable to the decisions of the lower courts is we believe clearly pointed out in the following:

> "Thus in Ohio, at the present time, a worker may have his eyelids irritated on the outside by a given dust or vapor, producing a dermatitis, and draw compensation under Item II on the compensation schedule, but if the inside of the lids or the eyeball is afflicted by the same substance, he may not be compensated, since the law only applies to skin surfaces and not to mucous membrane. Thus the law practically splits hair and makes the eyelashes the dividing line. In a similar manner, silica, when inhaled, and producing silicosis, a lung disease which may permanently disable a worker, with great distress of breathing until he ultimately is gradually asphyxiated or develops pneumonia or tuberculosis and dies, is not compensated in Ohio, but if handling the fine silica dust produces an inflammation of the skin, that is, a dermatitis, he is eligible for compensation." Dr. E. R. Hayhurst, Chief, Occupational Disease Section, Ohio State Department of Health, page 8, September, 1935, "Timely Tidings on Tuberculosis."

By the decision of the Ohio Supreme Court in the case of *Triff* v. *National Bronze and Aluminum Foundry Company* it is clearly indicated that the Supreme Court of Ohio felt that some protection must be given to such as the one at bar and that there was unequal protection of the law within

the State. This was corrected not by a finding of unconstitutionality of the Ohio Statutes and Constitution but by an interpretation granting the rights claimants should and always did have according to the Ohio Supreme Court.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision of the United States Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX.

General Code 871-15.—"*Employer required to protect the life, health and safety of employees.*—Every employer shall furnish employment which shall be safe for the employees therein, and shall furnish a place of employment which shall be safe for the employees therein, and for frequenters thereof, and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes, follow and obey orders and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do *every other thing reasonably necessary to protect the life, health, safety and welfare of such employees and frequenters* (103 v. 99, 15)."

General Code. 871-16—"*Places of employment must be safe and provided with safety devices.*—No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees or frequenters; and no such employer or other person shall hereafter construct or occupy or maintain any place of employment that is not safe (103 v. 99, 16)."

General Code 6330-1. "*General duties of employers.*—Every employer shall, without cost to the employes, provide such reasonably effective devices, means and methods as shall be prescribed by the industrial commission of Ohio, to prevent the contraction by his employes of illness or disease incident to the work or process in which such employes are engaged (109 v. 181; 103 v. 819, #1, Eff. Aug. 5, 1921)."

General Code 1027.—"*Provisions to prevent injury to persons who use or come in contact with machinery.*

The owners and operator of shops and factories shall make suitable provisions to prevent injury to persons who use or

come in contact with machinery therein or any part thereof as follows:

(1 to 10 omitted.)

11. They shall provide emery wheels or belts of solid emery, leather, leather covered, felt, canvas, linen, paper, cotton or wheels or belts, rolled or coated with emery or corundum, or cotton wheels used as buffs, with blowers or similar apparatus placed over, beside or under such wheels or belts in such a manner as to protect the person or persons using them from particles of dust produced and caused thereby.

12. They shall provide each emery wheel with a sheet or cast iron hood or hopper of such form and so applied to it that the dust or refuse therefrom will fall from such wheels or will be thrown into such hood or hopper by centrifugal force and be carried off by the current of air into a suction pipe attached to such hood or hopper.

13. They shall provide an emery wheel six inches or less in diameter with a three inch suction pipe, an emery wheel six inches to twenty-four inches in diameter with a four inch suction pipe; an emery wheel twenty-four inches to thirty-six inches in diameter with a five inch suction pipe and every emery wheel larger than those provided for with a suction pipe not less than six inches in diameter. Such suction pipe shall be full sized to the main trunk suction pipe, and the main suction pipe to which smaller pipes are attached shall be equal in its diameter and capacity to the combined area of the smaller pipes attached to it. The discharge pipe from the exhaust fan connected with pipe or pipes shall be as large or larger than the suction pipe.

14. They shall provide necessary fans or blowers connected with suction pipes, which shall be run at a rate of speed sufficient to produce a velocity of air in such suction or discharge pipes of at least nine thousand feet per minute to an equivalent suction or pressure of air equal to raising a volume of water not less than five inches in a U shaped tube. All branch suction pipes must enter the main pipe at an angle of forty-five degrees or less; the main suction or

trunk pipe shall be below the emery or buffing wheels and as close to them as possible and be either upon the floor or beneath the floor on which the machinery to which such wheels are attached are placed. All bends, turns or elbows in such suction pipes must be made with *eacy* smooth surfaces having a radius in the throat of not less than two diameters of the pipe on which they are connected.

15. Nothing in this section regarding blowers, hoods, hoppers, or suction pipes shall apply to emery wheels upon which water is used at the point of the grinding contact, small emery wheels used temporarily for tool grinding or small shops employing not more than one man at work upon an emery wheel, which does not create dust enough in the opinion of the chief inspector of workshops and factories or a district inspector to be injurious to its operator. No female shall be employed in operating, assisting to operate, or using any of the wheels or belts specified in the preceding four subdivisions of this section (102 v. 428; 93 v. 155, 2, 3, 4; 94 v. 42, 1; 100 v. 63, 1)."

General Code 1465-70.—"*Employers complying with act not liable in damages.*—Employers who comply with the provisions of the last preceding section shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, *for injury or death of any employe,* wherever occurring, during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation direct to his injured or the dependents of his killed employees as herein provided. (103 v. 81, 23; 102 v. 531.)"

THE CONSTITUTION OF THE STATE OF OHIO.—Article II, Section 35.

Workmen's Compensation.

"For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers,

and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. *Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.* Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine *all* rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease of death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the *maximum award established by law,* shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount

of such additional award, notwithstanding any and all other provisions in this constitution.

SCHEDULE: If a majority of the electors voting on said amendment shall be ascertained, according to law, to have voted in favor thereof, the same shall take effect on the first day of January, 1924, and said original section 35 of article II of the constitution of Ohio shall thereupon be repealed. (Adopted November 5, 1923.) ("Yes," 588,851; "No," 528,572.)"